

IN THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF IDAHO
 U.S. COURTS
 DISTRICT OF IDAHO
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UNITED STATES OF AMERICA,

Plaintiff,

v.

FMC CORPORATION,

Defendant.

LODGED 11/13/98
 Civil No.

CIV 98-0406-E-BLW

CONSENT DECREE

WHEREAS, The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), has filed a Complaint in this matter, pursuant to Sections 3008(a) and (g) of the Solid Waste Disposal Act ("SWDA"), as amended by the Resource Conservation and Recovery Act ("RCRA") and the Hazardous and Solid Waste Amendments ("HSWA"), 42 U.S.C. §§ 6928(a) and (g) (hereinafter referred to collectively as "RCRA"), and regulations promulgated thereunder, against Defendant FMC Corporation ("FMC"), with respect to hazardous waste treatment, storage and disposal requirements applicable to FMC's elemental phosphorus manufacturing plant located on Highway 30 West of the City of Pocatello, Idaho, within the boundaries of the Fort Hall Indian Reservation (known as the "FMC Pocatello Plant");

WHEREAS, the United States in its Complaint seeks, inter alia, injunctive relief and the imposition of civil penalties against FMC for the violations of RCRA alleged in the Complaint;

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WHEREAS, the Parties agree, and this Court finds, that this Consent Decree has been negotiated by the Parties in good faith, that implementation of this Consent Decree will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest;

WHEREAS, the Parties agree that by entering into this Consent Decree the Defendant has not admitted the truth of any allegation in the Complaint except the allegations pertaining to venue and subject matter and personal jurisdiction; and

WHEREAS, the Parties, without the necessity of trial or adjudication of any issues of fact or law, and without any admission of liability by the Defendant, consent to entry of the following Consent Decree resolving Plaintiff's claims.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED THAT:

I. DEFINITIONS

1. Unless otherwise expressly provided herein, terms used in this Consent Decree or its Attachments that are defined in RCRA, 42 U.S.C. §§ 6901-6991i, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-280, shall have the meaning assigned to them in RCRA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the Attachments hereto and incorporated hereunder, the following definitions shall apply:

"Compliance Schedule" shall mean the schedule of work required under this Consent Decree to be completed by FMC as set forth in Attachment A to this Consent Decree, including Attachments thereto and incorporated plans, and any modifications

thereto made in accordance with Section XXIV (Modifications) of this Consent Decree;

"Consent Decree" shall mean this Decree and all Attachments listed in Section XXIII, including Appendices thereto and incorporated plans, and any modifications thereto made in accordance with Section XXIV (Modifications) of this Consent Decree. In the event of conflict between this Decree and any Attachment, Appendix, or incorporated plan, this Decree shall control;

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day;

"Defendant" means the Defendant in this action, FMC Corporation;

"DOJ" means the United States Department of Justice and any successor departments or agencies of the United States;

"EPA" means the United States Environmental Protection Agency and any successor departments or agencies of the United States;

"FMC Pocatello Plant" means the following manufacturing and hazardous waste treatment, storage and disposal operations owned and operated by Defendant FMC Corporation in Pocatello, Idaho: FMC Pocatello Plant, EPA RCRA I.D. No. IDD070929518;

"Interest" shall mean interest at the rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717. Such interest shall be compounded annually on October 1st of each year;

"LDR" means land disposal restrictions promulgated pursuant to 42 U.S.C. § 6924 and codified at 40 C.F.R. Part 268;

"Notify" and "Submit" and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, deposit in the United States mail, or dispatch by express courier not later than the day that such transmission or communication is required by this Consent Decree. Should such day be a weekend day or a federal holiday, the delivery, deposit, or dispatch shall be due on the next business day;

"Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or a lower case letter;

"Parties" shall mean the United States (Plaintiff) and FMC Corporation (Defendant);

"Plaintiff" shall mean the United States of America;

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource Conservation and Recovery Act);

"Section" shall mean a portion of this Consent Decree identified by a Roman numeral;

"Tribe" shall mean the Shoshone-Bannock Tribe residing on the Fort Hall reservation near Pocatello, Idaho;

"United States" shall mean the United States of America, including its departments, agencies and instrumentalities; and

"Work" shall mean all activities Defendant is required to perform under this Consent Decree, together with its Attachments, except those required by Section XX (Record Retention).

II. JURISDICTION

2. This Court has jurisdiction over the subject matter and over the parties pursuant to RCRA §§ 3008(a), 42 U.S.C. § 6928(a), and 28 U.S.C. §§ 1331, 1345, and 1355. This Court also has personal jurisdiction over the Defendant. The Complaint filed herein states claims for which, if the allegations were proved, relief could be granted. Solely for the purposes of this Consent Decree and the underlying Complaint, Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of the Defendant with respect to all matters arising under or relating to this Consent Decree. Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

III. PARTIES BOUND AND NOTICE OF TRANSFER

3. The provisions of this Consent Decree shall apply to and be binding upon the United States and upon FMC and its officers, agents, successors, assigns, and all persons acting on their behalf. Each party certifies that at least one of its undersigned representatives is fully authorized by the party whom he or she represents to enter into the terms and conditions of this Consent Decree, to execute it on behalf of that party, and to legally bind the party on whose behalf he or she executes this Consent Decree.

4. Unless otherwise agreed to by EPA, no change in ownership, corporate, or partnership status relating to the FMC Pocatello Plant, or conveyance of title, easement, or other interest in the FMC Pocatello Plant, including but not limited to any lease or transfer of assets or real or personal property, will alter the Defendant's obligation to comply with the requirements of this Consent Decree or to ensure compliance by any successor or assign of the Defendant, regardless of whether the Defendant continues to exist following the transaction. In the event that any such conveyance or lease of property at the FMC Pocatello Plant will entail the usage by another person of Defendant's hazardous waste treatment, storage, or disposal facilities regulated under RCRA, then it shall be Defendant's obligation to require compliance by that person with the relevant portions of the Consent Decree, and to reserve the right to monitor compliance by that person. Defendant shall remain liable to EPA for any stipulated penalties that may accrue due to any

non-compliance by that person. In all cases, it shall be Defendant's obligation with respect to any portion of the FMC Pocatello Plant conveyed or leased to ensure access to property and information pursuant to Sections VI and XIX of this Consent Decree. Any deed, title, or other instrument of conveyance shall contain a notice that the FMC Pocatello Plant is the subject of this Consent Decree, setting forth the case caption and index number, and the Court having jurisdiction.

5. In addition to any notification required by RCRA, Defendant shall notify EPA and the Tribe at least 90 days prior to a change in the operational and/or ownership control of any portion of FMC Pocatello Plant, including but not limited to the conveyance of title, easement, or other interest, including a leasehold interest. This notice shall also include a description of both the current and expected future activities on that portion of the FMC Pocatello Plant to be conveyed, leased, or otherwise alienated. Defendant shall also provide a copy of this Consent Decree to the grantee prior to any such conveyance.

6. Defendant shall provide to each contractor hired to perform any of the Work (as defined above) required by this Consent Decree or its Attachments (and to each person representing the Defendant with respect to the Work), a copy of all Sections of this Decree and/or Attachments relevant to the contractor's employment, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree and its Attachments. Defendant or its contractors shall provide written notice of the

Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Defendant nonetheless shall be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree.

IV. GENERAL PROVISIONS

7. Compliance With Applicable Law: All activities undertaken by Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal, state and local laws, permits, and regulations, including, without limitation, federal and state regulations governing the generation, treatment, storage, transport, and disposal of hazardous waste.

8. Permits: Where any portion of the Work requires a federal, state, or tribal permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

9. The Defendant may seek relief under the provisions of Section XVII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work, provided that Defendant has used due diligence to obtain such permit.

10. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal, state, or tribal statute or regulation.

V. PERFORMANCE OF THE WORK BY DEFENDANT

11. Defendant shall comply with the provisions, terms, and schedules set forth in the Compliance Schedule set forth in Attachment A, which is incorporated by reference into this Consent Decree.

12. If, prior to Defendant's Request for an Acknowledgment of Completion pursuant to Section XI of this Consent Decree, Plaintiff determines that Defendant's performance of the Work is inadequate or incomplete, EPA will notify Defendant in writing of the activities that must be undertaken to complete the Work, and will set forth in the notice a period for Defendant to satisfactorily complete the Work. Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to any right provided in this Consent Decree to invoke the dispute resolution procedures set forth in Section XVI (Dispute Resolution).

VI. SITE ACCESS

13. Commencing upon the date of lodging of this Consent Decree, Defendant agrees to provide the United States, the Tribe, and their representatives, including their agencies, employees and authorized agents (including contractors and subcontractors), access at all reasonable times to the FMC Pocatello Plant, and any other property owned or controlled by Defendant or accessible to Defendant by contract, to which access is required for the implementation of this Consent Decree, for the purposes of

conducting any activity related to this Consent Decree including, but not limited to:

- a. Monitoring the Work;
- b. Verifying any data or information submitted to the United States;
- c. Conducting investigations relating to the Work;
- d. Obtaining samples relating to the Work;
- e. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Defendant or its agents related to the Work; and
- f. Assessing Defendant's compliance with this Consent Decree.

14. The activities authorized by this Section include, but are not limited to:

- a. interviewing and obtaining oral, written, or recorded statements from personnel involved in activities pertaining to the Work required by this Consent Decree, whether such personnel are employed by the Defendant or by its contractors or subcontractors;
- b. inspecting, reviewing, and copying all documents that relate to activities pertaining to the Work required by this Consent Decree;
- c. observing, photographing, or otherwise documenting the performance or completion of activities pertaining to the Work required by this Consent Decree; and

d. conducting such other monitoring and investigative activities as EPA deems necessary to monitor activities pertaining to the Work required by this Consent Decree.

15. At the time of entering the FMC Pocatello Plant, EPA employees and representatives shall present valid credentials or other official authorization. The Defendant shall have the right to accompany EPA representatives throughout their presence at the FMC Pocatello Plant, and to monitor and record the investigative activities conducted by EPA, so long as such monitoring or recording does not delay or impede the investigative activities of EPA. If a recording of EPA's investigatory activities is made by EPA, or the Defendant, a copy of the recording shall be provided to the other participant.

16. Defendant, upon request at the time of sampling, may obtain splits of any samples taken by the United States, EPA, the Tribe, or their representatives, and, upon request, shall be provided with copies of the results of sampling, analysis, tests, or other raw data generated as a result of activities authorized under Paragraphs 13, 14 and 15 of this Consent Decree.

17. Notwithstanding the foregoing Paragraph or any other provision of this Consent Decree, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under RCRA and any other applicable statutes, regulations or permits.

VII. CERTIFICATIONS

18. Whenever this Consent Decree or its Attachments requires the Defendant to submit a work plan, design, study, report, or other document, it shall be signed and certified as accurate by a responsible corporate officer as defined in 40 C.F.R. § 270.11(a)(1), or his duly authorized representative. This certification shall include the following language:

I certify under penalty of law that this document and any attachments to it were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VIII. NOTICES

19. Whenever under the terms of this Consent Decree notice is required to be given or a report or other document is required to be forwarded by one party to another, it shall be directed to the individuals and addresses specified in Paragraphs 20 and 21, below, unless otherwise specified by this Consent Decree. Any correspondence submitted to the government shall include a reference to the case caption and index number of this court action. Any changes in the person designated to send or receive such notice or in the address to which the notice is to be sent shall be provided to the other parties, in writing, in accordance with the requirements of this Section.

20. Any technical reports or data required to be submitted under this Consent Decree shall be submitted to:

Director
Office of Waste and Chemicals Management
U.S. Environmental Protection
Region X
M/S WCM-127
1200 Sixth Avenue
Seattle, Washington 98101
[four copies]

Director, CERCLA/RCRA Program
Shoshone-Bannock Tribes
P.O. Box 306
Fort Hall, Idaho 83203
[two copies]

21. Any other notifications or submissions shall be sent both to the persons named in Paragraph 20 and to the parties named below, who are hereby designated to communicate informally about problems incurred or anticipated in meeting the requirements of this Consent Decree and its Attachments:

As to the United States:

Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
1425 New York Avenue, N.W.
Washington, D.C. 20005

Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency M/S ORC-158, 15th Floor 1200
Sixth Avenue
Seattle, Washington 98101

As to the Defendant:

Environmental Manager
FMC Corporation Pocatello Plant
Highway 30 West
P.O. Box 4111
Pocatello, Idaho 83202

As to the Tribe:

Attorney's Office
Shoshone-Bannock Tribes
P.O. Box 306
Fort Hall, Idaho 83203

22. Such informal communication is intended to facilitate meeting the objectives of this Consent Decree and shall not relieve the parties of the notice and reporting requirements set forth elsewhere in this Consent Decree and its Attachments.

IX. SUBMISSIONS REQUIRING AGENCY APPROVAL

23. After review of any plan, report, schedule, or other item that is required to be submitted to EPA for approval pursuant to this Consent Decree, EPA shall, in writing:

(a) approve, in whole or in part, the submission; (b) approve the submission with specified modifications; (c) approve the submission upon specified conditions; (d) disapprove, in whole or in part, the submission, directing that the Defendant modify the submission; or (e) any combination of the above.

24. In the event of approval or approval with modifications or upon conditions by EPA, pursuant to Paragraphs 23(a), (b) or (c), Defendant shall proceed to take any action required by the plan, report, schedule or other item, as approved, modified, or conditioned by EPA.

25. Upon receipt of a notice of disapproval pursuant to Paragraph 23(d), Defendant shall, within fifteen (15) working days or such other time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, schedule or other item for approval. The revised document, if approved by

EPA, shall become final. Any stipulated penalties applicable to the submission, as provided in Section XV, shall accrue during the specified period, but shall not be payable unless the resubmission is disapproved due to a material defect as provided in Paragraph 28.

26. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 23(d), Defendant shall proceed, if EPA so directs, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Defendant of any liability for stipulated penalties under Section XV (Stipulated Penalties).

27. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Defendant to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report, or other item. Defendant shall implement any such plan, report, or item as modified or developed by EPA.

28. If, upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Defendant shall be deemed to have failed to submit such plan, report, or item in a timely and adequate manner, and shall be subject to stipulated penalties pursuant to Paragraph 47(c), unless the Defendant invokes, in a timely manner and if applicable, the dispute resolution procedures set forth in Section XVI (Dispute Resolution) and EPA's action is overturned

pursuant to that Section. The provisions of Section XVI (Dispute Resolution) and Section XV (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during dispute resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XV (Stipulated Penalties).

29. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon written approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves, modifies, or conditions a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, such approval shall be in writing, and the approved, modified or conditioned portion shall be enforceable under this Consent Decree.

X. EMERGENCY RESPONSE

30. In the event of any action or occurrence during the performance of the Work that causes or threatens a release of hazardous waste or hazardous constituents from the Site that constitutes an emergency situation, or that may present an immediate threat to public health or welfare or the environment, Defendant shall, in addition to complying with any applicable notice requirement specified by law or regulation, provide oral notice within one (1) day to the Director of the Office of Waste and Chemicals Management, EPA, Region X, and shall notify EPA in writing within three (3) days, summarizing the nature, immediacy,

and magnitude of the actual or potential threats to human health or the environment. The written notice requirement may be satisfied by sending to the addresses specified in Section VIII (Notices) of this Decree a copy of any notice that includes the required information and that is generated pursuant to a requirement of CERCLA, or pursuant to a state statute or tribal regulation, together with a cover letter specifying that the notice is being provided pursuant to this Consent Decree, and including the docket number of this case.

31. The Defendant shall, within ten (10) working days, submit to EPA for its approval, a plan to mitigate the threat or emergency condition in accordance with all applicable laws and regulations. EPA will approve or modify this plan, and the Defendant shall implement this plan as approved or modified by EPA. If EPA determines that quicker action is required, then the Director of the Office of Waste and Chemicals Management for Region X may orally authorize Defendant to act prior to Defendant's making any written submission to EPA. In the case of an extreme emergency, Defendant may act without prior EPA approval; any such unapproved action shall be taken at Defendant's own risk, and Defendant shall be responsible for any different or additional action subsequently required by EPA to mitigate the threat(s).

32. If EPA determines that activities in compliance or non-compliance with this Consent Decree have caused or may cause a release of a hazardous waste or hazardous constituent, or may pose a threat to human health or the environment, EPA may direct

Defendant to stop further implementation of this Consent Decree, or a portion of this Consent Decree, for such period of time as may be needed to abate any such release or threat and/or to undertake any action that EPA determines to be necessary. Any stipulated penalties that accrue as a result of EPA's direction that Defendant stop further implementation of this Consent Decree, or a portion of this Consent Decree, shall accrue during the period of delay, but shall not be payable unless the release or threat is the result of activities not in compliance with this Consent Decree.

33.. Subject to the provisions of the foregoing Paragraph 32 and Section XVII (Force Majeure) of this Consent Decree, the existence of emergency conditions shall in no way relieve Defendant from timely implementation of the activities required by this Consent Decree or its Attachments.

34. In the event that Defendant fails to take appropriate response action as required by this Section, and EPA takes such action instead, Defendant shall reimburse EPA for all costs of such action, in accordance with Paragraphs 40-42, including but not limited to costs incurred in connection with hiring contractors and subcontractors, and any enforcement costs.

35. Nothing in the preceding paragraph or in this Consent Decree shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action, or to seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of any solid waste, hazardous waste

or hazardous constituents on, at, or from the FMC Pocatello Plant.

XI. COMPLETION OF THE WORK

36. Within ninety (90) days after Defendant concludes that all phases of the Work required under any section of the Compliance Schedule have been fully performed, Defendant shall submit one or more written reports by registered professional engineers in the relevant technical fields, certifying in compliance with Section VII of this Consent Decree that the Work required by that section of the Compliance Schedule has been completed in full satisfaction of its requirements. These reports shall indicate the case name and civil action number, and shall contain the following statement, signed by a responsible corporate official of Defendant:

To the best of my knowledge, after thorough investigation in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted, I certify, based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, that FMC has completed in accordance with the Consent Decree the Work set forth in Section ___ of the Compliance Schedule attached to the Consent Decree, and that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If EPA so requests, Defendant shall schedule and conduct an inspection of the FMC Pocatello Plant, to be attended by

Defendant and EPA, to review the certified portion of the Work. The Tribe also shall be invited to attend.

37. If, after review of the final written reports and certifications, and any inspection, EPA determines that any portion of the certified Work has not been completed in accordance with this Consent Decree and the Compliance Schedule, EPA will notify Defendant in writing of the activities that must be undertaken to complete this portion of the Work. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and Compliance Schedule, or will require Defendant to submit a schedule to EPA for approval pursuant to Section IX (Submissions Requiring Agency Approval). Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to its right, if any, to invoke the dispute resolution procedures set forth in Section XVI (Dispute Resolution). Upon completion of these activities, Defendant shall submit revised written reports and certifications for the completed portion of the Work.

38. Within ninety (90) days of Defendants' completion of all the Work required under the Compliance Schedule and Attachment B, Defendant shall submit a Request for Acknowledgment of Completion, referencing all final written reports and certifications submitted pursuant to Paragraph 37, supra, and Paragraph 9 of Attachment B. Following its receipt of the Request, EPA may request an inspection or provide notice of activities that must be undertaken to complete the Work, as set

forth in Paragraph 37. If EPA concludes, based on the initial or any subsequent Request for an Acknowledgment of Completion by Defendant, and after a reasonable opportunity for review and comment by the Tribe, that the Work required under the Compliance Schedule and Attachment B has been performed in accordance with this Consent Decree, EPA will so notify the Defendant in writing, which notice shall constitute the Acknowledgment of Completion.

XII. ENFORCEMENT COSTS

39. If, following compliance with Paragraph 12 and/or 37, Plaintiff determines that Defendant's performance of the Work remains inadequate or incomplete, Defendant shall reimburse the United States for all costs incurred by or on behalf of the United States in connection with the enforcement of this Consent Decree or the performance of the Work, including but not limited to costs incurred in connection with hiring contractors and subcontractors to review the FMC Pocatello Plant and to oversee and monitor the Work.

40. The United States will send Defendant a bill detailing costs to be paid pursuant to Paragraph 39, and requiring payment. This bill shall include a Regionally-Prepared Cost Summary that includes direct and indirect costs incurred by EPA and DOJ and their contractors on a quarterly basis. Defendant shall make all payments within thirty (30) days of Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 41. Payment shall be made by Electronic Funds Transfer ("EFT") to the U.S. Department of Justice lockbox bank at the Office of

the United States Attorney for the District of Idaho, referencing the DOJ Number, 90-7-1-889, and the U.S.A.O. file number. Notice of the EFT and copies of any correspondence from Defendant to the United States Attorney shall be sent to the United States and EPA as provided in Section VIII (Notices) of this Decree.

41. Defendant may contest payment of any costs invoiced under Paragraph 40 on the ground that the United States has made an accounting error or has billed Defendant for costs not relating to performance of the Work or to the enforcement of this Consent Decree. Such objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to the United States pursuant to Section VIII (Notices) of this Decree. Any such objection shall specifically identify the contested costs and the basis for objection.

a. In the event of an objection, the Defendant shall within the thirty (30) day period pay all uncontested costs to the United States in the manner described in Paragraph 40. Simultaneously, the Defendant shall establish an interest bearing escrow account in a federally-insured bank duly chartered in the State of Idaho and remit to that escrow account funds equivalent to the amount of the contested costs. The Defendant shall send to the United States, as provided in Section VIII (Notices) of this Decree, a copy of the transmittal letter and check paying the uncontested costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as

well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Defendant shall initiate the Dispute Resolution procedures in Section XVI (Dispute Resolution).

b. If the United States prevails in the dispute, within five (5) days of the resolution of the dispute, the Defendant shall pay the sums due (with accrued Interest) to the United States in the manner described in Paragraph 40.

c. If the Defendant prevails concerning any aspect of the contestee costs, the Defendant shall pay that portion of the costs (plus associated accrued Interest) for which it did not prevail to the United States in the manner described in Paragraph 40; any balance of the escrow account shall be disbursed to the Defendant.

d. The dispute resolution procedures set forth in this Paragraph, in conjunction with the procedures set forth in Section XVI (Dispute Resolution), shall be the exclusive mechanism for resolving disputes regarding the Defendant's obligation to reimburse the United States for its costs in connection with this Consent Decree.

42. In the event that the payments required by Paragraph 39 are not made within thirty (30) days of the Defendant's receipt of the bill, Defendant shall pay Interest on the unpaid balance at the rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717. The Interest on the United States' costs shall begin to accrue on the date of the Defendant's receipt of the bill, and shall continue to accrue at the rate specified through

the date of the Defendant's payment. Such Interest shall be compounded each federal fiscal year. Defendant shall also pay a 6% per annum penalty on any principal amount not paid within ninety (90) days of the due date. Payments of Interest and penalties made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Defendant's failure to make timely payments under this Section.

XIII. CIVIL PENALTY

43. Defendant will pay a civil penalty of eleven million, eight hundred sixty four thousand, eight hundred dollars (\$11,864,800) to the United States for the RCRA violations enumerated in the Complaint in this action, and Defendant also will conduct a number of Supplemental Environmental Projects ("SEPs"), as set forth in Section XIV, infra, and Attachment B hereto. It is expressly understood that the United States' agreement to the penalty amount set forth above is conditioned upon timely and complete implementation of these SEPs.

a. Within ten (10) working days of Defendant's receipt of notice of the lodging of this Consent Decree with the Court, Defendant shall establish an interest bearing escrow account meeting the requirements of this Paragraph in a federally-insured bank duly chartered in the State of Idaho, and shall remit to that escrow account funds in the amount of \$11,864,800.

b. Within the same time frame, Defendant shall send to the United States, by overnight mail directed to the addresses specified in Section VIII (Notices) of this Decree, copies of the

documents establishing and funding the escrow account, together with information containing the identities of the bank and of the escrow agent, the bank account under which the escrow account is established, and a bank statement or deposit slip showing the initial balance of the escrow account. The correspondence shall also reference the civil action number of this case, and the Department of Justice ("DOJ") case number (90-7-1-889).

c. All funds paid into the escrow account by Defendant shall remain in escrow and may not be withdrawn by any person except to make the payment required by Paragraph 43(d) of this Decree, unless the Court determines that entry of this Consent Decree is not in the public interest and declines to enter it as an order. If the Court declines to enter the Consent Decree as an order, all sums in the escrow account shall be returned to Defendant, together with any accrued Interest thereon.

d. Within ten (10) working days of Defendant's receipt of notice of entry of the Consent Decree by the Court, Defendant shall, through the escrow agent, remit the principal of the escrowed monies to the United States, together with any accrued Interest thereon. Payment shall be made by Electronic Funds Transfer ("EFT") to the U.S. Department of Justice lockbox bank at the Office of the United States Attorney for the District of Idaho, referencing the DOJ Number, 90-7-1-889, and the U.S.A.O. file number. Payment shall be made in accordance with instructions provided by the Plaintiff to the Defendant upon execution of the Consent Decree. Any EFTs received at the U.S. D.O.J. lockbox bank after 4:00 P.M. (Eastern Time) will be

credited on the next business day. Notice of the EFT and copies of any correspondence from Defendant to the United States Attorney shall be sent to the United States and EPA as provided in Section VIII (Notices) of this Decree.

44. In the event that the payment required by Paragraph 43 is not made in compliance with the terms of Paragraph 43(a) through 43(d), Defendant shall pay Interest on the unpaid balance at the rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717. The Interest on the penalty shall begin to accrue on the date of the 11th day following Defendant's receipt of notice of the entry of the Consent Decree, and shall continue to accrue at the rate specified through the date of payment. Such Interest shall be compounded each federal fiscal year. Defendant shall also pay a 6% per annum penalty on any principal amount not paid within ninety (90) days of the due date. Payments of Interest and penalties made under this Paragraph shall be in addition to stipulated penalties provided in Section XV (Stipulated Penalties) or any other remedies or sanctions available to Plaintiffs by virtue of Defendant's failure to make timely payments under this Section.

45. No payments made under this Section shall be tax deductible for federal or state tax purposes.

XIV. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

46. Defendant shall implement certain Supplemental Environmental Projects ("SEPs") in accordance with the provisions of Attachment B, hereto, to facilitate pollution reduction at the FMC Pocatello Plant. Defendant hereby certifies that, to the

best of its knowledge, it is not otherwise required, by virtue of any local, state or federal statute, regulation, order, consent decree, or other law, to perform the specific tasks enumerated in Attachment B to this Consent Decree. Defendant further certifies that it has not already received, and is not currently negotiating to receive, credit in any other federal, state, or tribal enforcement action for any of the SEPs specified in Attachment B.

XV. STIPULATED PENALTIES

47. Defendant shall be liable for stipulated penalties to the United States, as specified below, for failure to comply with the requirements of this Consent Decree, unless excused under Section XVIII (Force Majeure). "Compliance" by Defendant shall include timely completion of the activities required by this Consent Decree, Attachments A and B of this Consent Decree, or any work plan, schedule, or other document approved by EPA pursuant to this Consent Decree.

a. For failure to submit the Penalty pursuant to the terms of Section XIII, Defendant shall pay stipulated penalties in the following amounts for each day during which the payment is not received:

<u>Period of Failure To Comply</u>	<u>Penalty Per Violation Per Day</u>
1st through 30th day	\$1,000
31st through 60th day	\$2,500
61st day and beyond	\$5,000

b. For failure to meet the construction deadline established pursuant to Paragraph 14 of the Compliance Schedule,

the Defendant shall pay stipulated penalties in the following amounts for each day during which each violation continues:

<u>Period of Failure To Comply</u>	<u>Penalty Per Violation Per Day</u>
1st through 60th day	\$12,000
61st day and beyond	\$15,000

c. For failure to meet any implementation or construction deadline established pursuant to the balance of the Compliance Schedule or Attachment B, or to comply with the notice requirements of Section X (Emergency Response) of this Consent Decree, the Defendant shall pay stipulated penalties in the following amounts for each day during which each violation continues:

<u>Period of Failure To Comply</u>	<u>Penalty Per Violation Per Day</u>
1st through 30th day	\$1,500
31st through 60th day	\$2,000
61st day and beyond	\$5,000

d. For failure to meet any document submittal deadline established in the Compliance Schedule or Attachment B, or to comply with the requirements of Section XX (Record Retention) of this Consent Decree, the Defendant shall pay stipulated penalties in the following amounts for each day during which each violation continues:

<u>Period of Failure To Comply</u>	<u>Penalty Per Violation Per Day</u>
1st through 30th day	\$500
31st through 60th day	\$1,000
61st day and beyond	\$2,500

48. All stipulated penalties begin to accrue on the day that performance is due or a violation occurs, and continue to

accrue through the final day of all corrections of the noncompliance. Nothing herein shall preclude the simultaneous accrual of separate stipulated penalties for separate violations of this Consent Decree. Defendant shall notify EPA in writing of any failure to meet Consent Decree requirements for which stipulated penalties may be due as soon as it has knowledge of such failure. Plaintiff shall notify Defendant as soon as practicable of any alleged failure by Defendant to meet Consent Decree requirements for which stipulated penalties may be due. Plaintiff reserves the right to demand payment of stipulated penalties upon a determination by Plaintiff that a violation of this Consent Decree has occurred. However, penalties shall accrue as provided in Paragraphs 47 and 48, regardless of whether Defendant or the EPA has notified the other of a violation.

49. The payment of penalties shall not alter in any way Defendant's obligation to complete the performance of the Work required under this Consent Decree.

50. All penalties owed to the United States under this Section shall be due and payable within thirty (30) days of the Defendant's receipt from EPA of a demand for payment of the penalties, unless Defendant invokes the Dispute Resolution procedures under Section XVI (Dispute Resolution). All payments under this Section shall be made by Electronic Funds Transfer ("EFT") to the U.S. Department of Justice lockbox bank at the Office of the United States Attorney for the District of Idaho, referencing the DOJ Number, 90-7-1-889, and the U.S.A.O. file

number. Notice of the EFT shall be provided in a letter stating the caption and docket number of this case and addressed to:

Chief, Civil Division
United States Attorney's Office
Western District of Washington
1200 Sixth Avenue
Seattle, Washington 98101

A copy of any correspondence from Defendant to the United States Attorney shall be sent to the United States and EPA as provided in Section VIII (Notices).

51. Penalties shall continue to accrue as provided in Paragraphs 47 and 48 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, any accrued penalties determined to be owing shall be paid to the United States within fifteen (15) days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owed to the United States within sixty (60) days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any Party, Defendant shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within sixty (60) days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days.

Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to the United States or to Defendant to the extent that it prevails.

52. If Defendant fails to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as Interest. Defendant shall pay Interest on the unpaid penalties at the rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717, beginning on the date of demand made pursuant to Paragraph 50, and shall continue to accrue at the rate specified through the date of the Defendant's full payment. Such Interest shall be compounded each federal fiscal year.

53. The stipulated penalties set forth above are intended to be in addition to the rights reserved to the Plaintiff in Section XXI of this Consent Decree. Nothing in this Section shall be construed as prohibiting, altering, or in any way limiting the ability of the Plaintiff to seek other remedies or sanctions available by virtue of Defendant's violation(s) of this Consent Decree or of the statutes and regulations referenced herein.

54. No payments made under this Section shall be tax deductible for federal or state tax purposes.

XVI. DISPUTE RESOLUTION

55. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. These procedures may be

invoked by either party for disputes arising out of matters identified in this Consent Decree as subject to dispute resolution, and in all cases where stipulated penalties are demanded of Defendant pursuant to Section XV (Penalties). However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Defendant that have not been disputed by Defendant in accordance with this Section, and shall not be construed to grant or to foreclose to Defendant any right to dispute EPA decision-making on matters not arising under this Consent Decree which may be subject to administrative and/or judicial review under RCRA or the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"). "Matters arising under this Consent Decree" for the purpose of this Section shall include requirements expressly provided for in the Consent Decree and Attachments, but shall not include matters pertaining to: (a) closure plan elements not expressly required by the Consent Decree and Attachments, and (b) RCRA permit matters pertaining to the LDR Treatment System and related components not expressly required by the Consent Decree and Attachments. The requirements of Section IX (Submissions Requiring Agency Approval) apply only to plans, reports, schedules or other items submitted to EPA with respect to matters arising under the Consent Decree.

56. Any dispute subject to dispute resolution that arises under or with respect to this Consent Decree shall, in the first instance be the subject of informal negotiations between the parties to the dispute. The dispute shall be considered to have

arisen when one party sends the other party a written Notice of Dispute. The period for informal negotiations shall conclude upon written notice by either party, but shall not exceed 21 days from the date of the Notice of Dispute unless such time period is extended by written agreement of the parties.

57. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the written position advanced by EPA shall be considered binding unless Defendant invokes the formal dispute resolution procedures of this Section by filing with the Court a petition seeking review of EPA's decision. Any such petition shall be filed within ten (10) working days from the date of receipt of EPA's written position or the conclusion of the informal negotiation period as set forth in Paragraph 56, whichever is later. In any such dispute, the Defendant shall bear the burden of proof. No inferences or presumptions adverse to either party will be drawn as a result of the termination of informal negotiations or the invocation of formal dispute resolution procedures. The Plaintiff shall have forty-five (45) days to respond to the petition and Defendant shall have five (5) working days to reply to Plaintiff's response. The filing of a petition asking the Court to resolve a dispute shall not, in itself, postpone the deadlines for the Defendant to meet its obligations under this Consent Decree with respect to the disputed issue.

58. If the Defendant does not file a petition with the Court within the time period required in Paragraph 57, it will

have waived its right to challenge Plaintiff's resolution of the matter.

59. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Defendant under this Consent Decree not directly in dispute, unless EPA agrees or the Court determines otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue, except during the period between Defendant's filing of a petition for judicial review and Plaintiff's response thereto, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 51. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XV (Stipulated Penalties).

XVII. FORCE MAJEURE

60. The Defendant's obligation to comply with the provisions of this Consent Decree shall be deferred to the extent and for the duration that the delay in compliance is caused by a "force majeure" event and does not conflict with statutorily imposed deadlines. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Defendant or of any entity controlled by Defendant, including, but not limited to, its contractors and subcontractors, that delays or prevents the performance of any

obligation under this Consent Decree despite Defendant's best efforts under the circumstances to fulfill the obligation. The requirement that the Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force majeure" shall not apply to any delay due to increased costs or Defendant's financial inability to carry out the provisions of this Consent Decree, normal precipitation events, or to the Defendant's failure to make timely and bona fide applications and to exercise diligent effort to obtain permits. For purposes of this Decree, "normal precipitation events" are those which are equal to or less than a twenty-four hour, twenty-five year storm event. It is expressly understood that force majeure events do not include reasonably foreseeable plant upsets, equipment failures, operator errors, and contractor disputes that could be avoided by Defendant's best efforts to anticipate or address such events.

61. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall notify EPA within 48 hours by telephone and shall submit written notification to EPA within ten (10) working days after the date when it first obtained knowledge that the event might cause a delay. Such written notice shall include the nature, cause and

anticipated length of the delay and all steps that the Defendant has taken and will take, with a schedule for implementation, to avoid or minimize the delay, and the Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim. The Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendant from asserting any claim of force majeure for that event. Defendant shall be deemed to have notice of any circumstance of which its contractors or subcontractors had or should have had notice.

62. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, EPA will notify the Defendant in writing of the length of the extension, if any, for performance of the obligations under this Consent Decree that are affected by the force majeure event. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Defendant in writing of its decision.

63. If the Defendant elects to invoke the dispute resolution procedures set forth in Section XVI (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence

that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 61 and 62, above. If Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

XVIII. INDEMNIFICATION

64. The United States does not assume any liability by entering into this agreement. Defendant shall indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, acts or omissions of Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. Further, the Defendant agrees to pay the United States all costs it incurs including, but not limited to, attorneys' fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on acts or omissions of Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. The United States shall not be

held out as a party to any contract entered into by or on behalf of Defendant in carrying out activities pursuant to this Consent Decree. Neither the Defendant nor any such contractor shall be considered an agent of the United States.

65. Defendant waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States arising from or on account of any contract, agreement, or arrangement between Defendant and any person for performance of Work on or relating to the FMC Pocatello Plant, including, but not limited to, claims on account of construction delays. In addition, Defendant shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Defendant and any person for performance of Work on or relating to the FMC Pocatello Plant, including, but not limited to, claims on account of construction delays.

XIX. ACCESS TO INFORMATION

66. Defendant shall provide to EPA and the Tribe, upon request, copies of all documents and information within its possession or control or that of its contractors, subcontractors, agents, or lessees relating to the implementation of this Consent Decree, including, but not limited to, raw data, test results, memoranda, reports, correspondence, notes, any drafts of the foregoing, or other documents or information related to the Work. Upon written request by EPA, or upon oral request during any EPA inspection, Defendant shall also make available to EPA for

purposes of investigation and information gathering its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

67. All data, factual information, and documents obtained by the Plaintiff from or on behalf of the Defendant pursuant to this Consent Decree or its Attachments shall be subject to public inspection unless identified as confidential by the Defendant in conformance with 40 C.F.R. Part 2. Upon request by EPA, Defendant also shall provide responses to the questions listed at 40 C.F.R. § 2.204(e)(4). EPA reserves its right, pursuant to 40 C.F.R. §§ 2.204(a)(2) and (a)(3), to demand that Defendant submit these responses in connection with its initial designation of material as confidential. The data, factual information, and documents so identified as confidential shall be disclosed only in accordance with appropriate EPA and DOJ regulations. Any information identified by Defendant as confidential may also be shared with representatives of the Tribe, subject to the same restrictions upon disclosure applicable to EPA and DOJ. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Defendant that the documents or information are not confidential under the standards of 40 C.F.R. § 2.204(e)(4), the public may be given access to such documents or information without further notice to Defendant.

68. The Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal

law. If the Defendant asserts such a privilege in lieu of providing documents, it shall notify the Plaintiff that such a claim is being made, and upon request shall provide the Plaintiff with the following information: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Defendant. However, no documents, reports or other information created or received pursuant to the requirements of the Consent Decree and its Attachments shall be withheld on the grounds that they are privileged. No claim of privilege shall be made with respect to any data (including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data) that are developed pursuant to this Consent Decree or its Attachments.

XX. RECORD RETENTION

69. In addition to complying with any record-keeping requirements under applicable law and regulations, Defendant shall preserve and maintain, during the pendency of this Consent Decree, and for a minimum of three (3) years after termination of this Consent Decree, at least one legible copy of all reports required to be generated by Defendant under this Consent Decree, together with documentation, in either electronic or hard copy form, of the research and data used to generate such reports or which otherwise demonstrate the performance of Defendant's

obligations under this Consent Decree. In addition, all memoranda, communications, meeting minutes, and drafts prepared in connection with each report required to be generated by Defendant under this Consent Decree, and relevant to the issue of the adequacy of Defendant's performance of its obligations under this Consent Decree, shall be maintained until one (1) year following EPA's written approval of each final report, regardless of any corporate document retention policy to the contrary.

70. Notwithstanding the provisions of Paragraph 69, supra, the Defendant may request in writing permission from EPA to not preserve, to not maintain, or to destroy certain specified categories of documents. Defendant's obligations under Paragraph 69, supra, will remain unchanged, however, unless and until EPA issues written approval of the request, which may or may not, in EPA's discretion, include a waiver of Defendant's obligations under Paragraph 71, infra.

71. Upon the expiration of any obligation under Paragraph 70, supra, the Defendant shall provide no less than 90 days notice to the Plaintiff that no further preservation or maintenance of records is planned, or that destruction of records is planned, and shall make such records available to EPA for inspection, copying or retention. This notification will identify the nature of the records and their storage location or locations.

72. The Defendant further agrees that within thirty (30) days of retaining or employing any agent, consultant or

contractor for the purpose of carrying out the terms of this Consent Decree, the Defendant will enter into an agreement, with any such agents, consultants or contractors whereby such agents, consultants and/or contractors will be required to provide a copy to the Defendant for subsequent retention by Defendant in accordance with Paragraph 69, supra, of all documents produced pursuant to this Consent Decree. Such agreement shall require said agents, consultants and/or contractors upon completion of their work to furnish the Defendant a copy or originals of all documents, data, analyses, and all other materials created or obtained during their performance of work specified in this Consent Decree.

XXI. COVENANT OF PLAINTIFF

73. In consideration of the Work and Supplemental Environmental Projects that will be performed and the penalties that will be paid by the Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs 74, 75, and 78, the United States covenants not to sue or to take administrative action against Defendant pursuant to Sections 3008(a) and (g) of RCRA for the claims specifically alleged in the Plaintiff's Complaint. This covenant not to sue is expressly conditioned upon the complete and satisfactory performance by Defendant of its obligations under this Consent Decree, including the Attachments hereto, and may be voided if Defendant fails to comply with any of the requirements of this Consent Decree. This covenant becomes effective upon the issuance of the Acknowledgment of Completion, and is conditioned upon the

veracity of Defendant's certifications and written reports as required in Section XI (Completion of Work). This covenant not to sue extends only to the Defendant and does not extend to any other person.

74. The United States retains all authority and reserves all rights to take any and all actions authorized by law to protect human health and the environment.

75. The rights reserved to the Plaintiff include the right to disapprove of Work performed by the Defendant pursuant to this Consent Decree.

76. This Consent Decree shall not be construed as a ruling or determination of any issue related to any federal, state, tribal, or local permit, if required in order to implement this Consent Decree or required in order to continue or alter operations of the FMC Pocatello Plant (including but not limited to construction, operation, or closure permits required under RCRA), and the Defendant shall remain subject to all such permitting requirements. The Defendant shall be responsible for obtaining any federal, state, or local permit(s) for any activity at the FMC Pocatello Plant, including those necessary for the performance of the work required by this Consent Decree.

77. Nothing in this Consent Decree is intended either to create any rights in or grant any cause of action to any person not a party to this Consent Decree, or to release or waive any claim, cause of action, demand, or defense in law or equity that any party to this Consent Decree may have against any person(s) or entity not a party to this Consent Decree.

78. Except as provided in Paragraph 73, the Plaintiff hereby reserves all statutory and regulatory powers, authorities, rights, remedies, both legal and equitable, civil, criminal, or administrative, including those that may pertain to the Defendant's failure to comply with any of the requirements of this Consent Decree or RCRA, including, without limitation, additional enforcement action and the assessment of penalties under Section 3008 of RCRA, 42 U.S.C. § 6928, against the Defendant, its officers and directors.

XXII. COSTS

79. Each party shall bear its own costs and attorneys' fees in the action resolved by this Consent Decree.

XXIII. ATTACHMENTS

80. The following Attachments are physically attached to and incorporated into this Consent Decree: "Attachment A" is the Compliance Schedule; "Attachment B" is the requirements for Supplemental Environmental Projects to be undertaken by Defendant. "Attachment C" is the description of and schedule for the Environmental Management Systems Audit to be undertaken by Defendant. Appendices to Attachments A and B, and plans specifically identified in these Attachments and Appendices as incorporated by reference, are also enforceable under this Consent Decree.

XXIV. MODIFICATION

81. Except as specifically provided for herein, there shall be no modifications or amendments of this Consent Decree without written agreement of the parties to this Consent Decree and

approval by this Court. Changes to the technical and schedule provisions set forth in the Attachments hereto, may be made without approval by the Court under the terms set forth in the respective Attachments, or upon written agreement between the Defendant and EPA.

XXV. EFFECTIVE AND TERMINATION DATES

82. This Consent Decree shall be effective upon the date of its entry by the Court. Provided that all penalties are paid pursuant to Sections XIII (Civil Penalty) and XV (Stipulated Penalties) of this Consent Decree , the Consent Decree shall be terminated one year after EPA's issuance of the Acknowledgment of Completion of the Work pursuant to Section XI of this Consent Decree, except for the requirements of Section XX (Record Retention), which shall terminate pursuant to the terms of that Section.

83. The parties may move jointly to terminate this Consent Decree based on their representation that all its requirements have been satisfied, and the Court may order such termination after conducting such inquiry as it deems appropriate.

XXV. RETENTION OF JURISDICTION

84. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Defendant for the duration of the performance of the terms and provisions of this Consent Decree, including its Attachments, for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent

Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XVI (Dispute Resolution) hereof.

85. The parties retain the right to seek to enforce the terms of this Consent Decree and take any action authorized by federal or state law not inconsistent with the terms of this Consent Decree to achieve or maintain compliance with the terms and conditions of this Consent Decree or otherwise.

XXVI. PUBLIC NOTICE REQUIREMENTS

86. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that the Consent Decree is inappropriate, improper, or inadequate. Defendant consents to the entry of this Consent Decree without further notice.

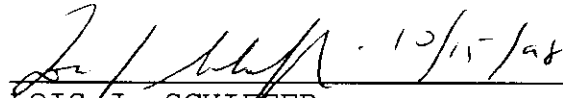
87. If, for any reason, the Court should decline to approve this Consent Decree in the form presented, then this agreement is voidable at the discretion of either party, and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

SO ORDERED THIS 13th DAY OF July, 1998.



United States District Judge

FOR THE UNITED STATES OF AMERICA

Date: 10/15/98

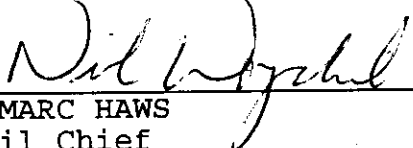



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Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

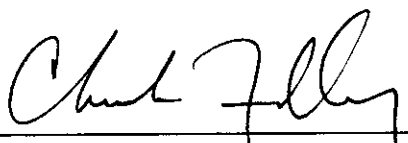


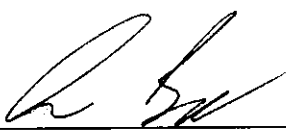
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BETTY H. RICHARDSON
United States Attorney
District of Idaho

By: 
for D. MARC HAWS
Civil Chief
U.S. Attorney's Office
District of Idaho

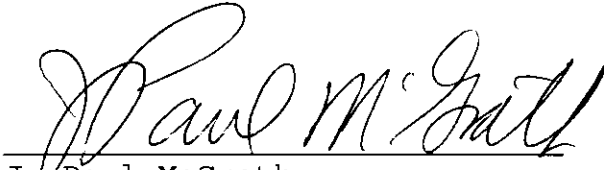

STEVEN A. HERMAN
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for CHUCK CLARKE
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ANDREW BOYD
Assistant Regional Counsel
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U.S. Environmental Protection
Agency
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FOR FMC CORPORATION

Date: 9/16/98


J. Paul McGrath
Senior Vice President and
General Counsel
200 East Randolph Drive
Chicago, IL 60601

Agent Authorized to Accept Service on Behalf of FMC

Name: Above signatory,

Title: _____

Address: _____

ATTACHMENT A
COMPLIANCE SCHEDULE

This compliance schedule governs FMC's obligations to effect changes at its Pocatello Facility with respect to its treatment, storage, handling and disposal of wastes. By agreeing to this injunctive relief, FMC neither admits nor denies the applicability of RCRA to the affected units. The provisions of this Compliance Schedule, including the attached Appendices, are not subject to the Dispute Resolution provisions of the Consent Decree (Section XVI), except where the United States seeks stipulated penalties for alleged violations of this Compliance Schedule in which case any review of EPA action shall be conducted under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

I. Closure of Specified Regulated Units:

1. FMC shall close Pond 8S in accordance with all applicable RCRA requirements and the EPA-approved closure plan for this unit. FMC will exercise best efforts to complete the construction of the final cover at this pond by December 31, 1998, but in no event later than November 1, 1999.

2. FMC shall not discharge waste to ponds 8E, 9E and 15S. FMC, however, shall continue to manage the water levels of ponds 8E and 15S, pending closure.

3. On or before December 1, 1998, FMC shall cease the discharge of waste to the Phase IV ponds. FMC, however, shall continue to manage the water levels of these ponds, pending closure.

4. FMC shall submit complete closure plans to EPA for the Phase IV ponds and ponds 15S by August 14, 1998 and for Pond 8E by September 14, 1998. The closure plans for the Phase IV Ponds and Pond 15S shall include the same elements, cap design, performance criteria and level of detail provided in the approved 8S closure plan. The closure plan for Pond 8E shall include temperature and pressure monitoring and gas collection systems at the same level of detail as that included in the approved 8S closure plan. The closure plans for these ponds shall provide for removal of water and the placement of sand and slag cover as early as possible. FMC shall place the initial fill and temporary cover on the Phase IV ponds and on Ponds 8E, and 15S no later than the first construction season following the year in which, by no later than November 30 (December 31 for Pond 8E), EPA approves this initial component of the closure plan. A

8. FMC shall submit revised closure plans to EPA for the scrubber blowdown wastewater treatment unit, the waste management unit #12, and the AFM Washing Unit (WMU #13) within thirty (30) days of receipt of any EPA comments on the plans included in the FMC Part B application. FMC shall complete closure within 180 days of EPA approval of the closure plans.

9. FMC must comply with the financial assurance requirements of 40 C.F.R. § 265 Subpart H.

II. Deactivation of ignitable and reactive waste streams.

10. On or before November 1, 1999, FMC shall submit a revised part A permit application and justification in accordance with 40 C.F.R. § 270.72(a) and (b) for the addition of processes and/or increases in design capacity necessary to construct a Land Disposal Restriction Treatment System ("LDR Treatment System"), including an off-gas treatment system, to satisfy applicable 40 C.F.R. Part 268 land disposal restriction (LDR) requirements and reduce the levels of elemental phosphorus and cyanide in the waste such that:

- a. The treated waste does not exhibit the characteristic of reactivity for phosphine and hydrogen cyanide gas. The phosphine and hydrogen cyanide concentrations released to the ambient air shall not exceed 0.3 parts per million (ppm) phosphine and 10.0 ppm hydrogen cyanide prior to the time the treated waste is placed in a surface impoundment, or is otherwise land disposed. Treated waste may be staged or stored prior to land disposal in compliance with 40 C.F.R. § 268.50. Ambient concentrations of phosphine and hydrogen cyanide gas in the immediate vicinity of the treated waste shall be determined before the treated waste is land disposed in accordance with the EPA approved plan required under Paragraph 12(b), infra.
- b. The treated waste does not exhibit the characteristic of ignitability as confirmed by testing the treated waste in accordance with approved EPA methods [SW-846 method 1030 for solids and the method for liquids specified at 40 C.F.R. § 261.21(a)] before the treated waste is land disposed. Treated waste may be staged or stored prior to land disposal in compliance with 40 C.F.R. § 268.50.

11. EPA will review the part A permit application and justification and grant or deny the request within 90 days of receipt, for the limited purpose of authorizing construction of the LDR Treatment System, including an off-gas treatment system. Operation of the hazardous waste LDR Treatment System, including treatment of off-gas, shall not commence until FMC demonstrates to EPA's satisfaction that the LDR Treatment System can satisfy the requirements specified in Paragraphs 10 and 12, and Appendix 1, infra, and EPA has approved the interim status operating plan and design documents. EPA will review the LDR Treatment System interim status operating plan and design documents submitted pursuant to paragraph 12 below, and approve or disapprove the plan and design documents by December 1, 2000.

III. Interim Pond Management

19. FMC shall comply with the terms and schedules of the EPA approved Pond Management Plan, dated September 1998, which is hereby incorporated into this Attachment.

20. Until startup of the LDR Treatment System, but in no event after May 26, 2002, FMC may discharge its phosphy hazardous waste to the Phase IV Ponds and Ponds 16S, 17 and 18, without treating it before or immediately after placement in the impoundment such that the waste no longer meets the definition of reactive or ignitable under 40 C.F.R. §§ 261.21 or 261.23, as required by 40 C.F.R. § 265.229 provided that:

- a. The ponds are otherwise in compliance with applicable RCRA requirements;
- b. FMC is in compliance with the schedule and requirements specified above in Section II for deactivation of ignitable and reactive waste;
- c. Approval of the LDR Treatment System interim status operating plan and design documents is granted by December 1, 2000; and
- d. FMC is in compliance with the terms and schedules of the EPA approved Pond Management Plan.

21. Within five (5) years after the LDR Treatment System begins operation, FMC shall remove all sediment collected in pond 18 in accordance with the EPA approved Pond Management Plan and shall treat it in the LDR Treatment System so that it does not exhibit the ignitability and reactivity characteristics as set forth herein.

22. In the event that FMC deposits in Pond 17 any phosphy waste other than precipitator slurry treated using the NOSAP process and meeting the criteria for NOSAP Waste as set forth in the EPA approved Pond Management Plan, Pond 17 shall be subject to the sediment removal and treatment requirements of Paragraph 21.

IV. Plant Upgrades

23. FMC shall manage phosphorus containing wastes in the Phos Dock and Furnace Building as ignitable (D001) and reactive (D003) hazardous wastes. FMC shall install secondary containment as required by 40 C.F.R. § 265.193, and in accordance with Appendix 2.

24. FMC shall manage ignitable and reactive hazardous waste as required by 40 C.F.R. § 265.198 in accordance with Appendix 2.

APPENDIX 1

**INFORMATION TO BE SUBMITTED ON THE LDR TREATMENT
AND OFF-GAS SYSTEM**

**For the LDR Treatment and Off-gas Treatment System
(Unit and Overall System Basis)**

- A. Design Information (for the documents due to be submitted to EPA on or before March 31, 2000, EPA will accept information based on at least 20% complete engineering design, however, FMC shall provide updated engineering design information to EPA upon request).

Engineering drawings and specifications
Piping and Instrumentation Diagrams

- B. Operating Plan

Standard Operating Procedures (for the documents due to be submitted to EPA on or before March 31, 2000, EPA will accept information based on at least 20% complete engineering design, however, FMC shall provide updated engineering design information to EPA upon request).

Critical Operating Parameters (i.e., temperature, pressure, flow rates, emission monitoring, etc.)

Automatic Waste Feed Cutoff Limits For Each Parameter including basis for limit set points

(Above supported using engineering calculations, manufacturer specifications and/or operating data.).

- C. Documentation of meeting 40 C.F.R. Part 264 Subpart J Standards for New Tanks
- D. Documentation of capability of system to meet the more stringent elements of: (1) 40 C.F.R. § 264.343 performance standards; or (2) more recent of (a) proposed April 19, 1996 Standards for Hazardous Waste Incinerators, Section 63.1203(b), or (b) final promulgated regulations under that section. Supported using engineering calculations,

Financial Documentation

Inspection Requirements

APPENDIX 2

Furnace Building and Phos Dock Upgrades

A. Furnace Building Upgrades

1. FMC shall upgrade the wastewater sumps, tanks and piping inside the furnace building to meet the applicable requirements of 40 C.F.R. Part 265, Subpart J by September 30, 1999. These sumps include V-1400, V-2400, V-3400, V-4400, and V-3607 and their associated piping.

2. FMC shall upgrade the V-3600 tank and the pipelines running from the V-3600 tank to any phosphy waste disposal ponds by September 30, 1999, in accordance with the requirements of 40 C.F.R. 265, Subpart J.

3. FMC shall complete the following upgrades by September 30, 1999:

- a. The emergency back-up line from the sump T-1415 to V-3600 will be upgraded to meet the requirements of 40 C.F.R. Part 265 Subpart J.
- b. FMC shall cease use of the east launder.
- c. To prevent any overflows of phosphy water from the furnace phosphorus product sumps to the main wastewater collection sumps, FMC shall install a retaining wall of no less than six (6) inches around the product sump areas. Excess phosphy water from the product sumps shall be routed back into the product sump or to the north launder for phos dock reprocessing and recycle.
- d. FMC shall install kick plates around the precipitators, furnace, and condenser to direct floor washing into floor drains.
- e. FMC shall re-route the secondary condenser T-4 sump blowdown line to deliver water to the furnace northeast sump for recycle at the phos dock.

4. FMC shall immediately commence upgrades of the furnace building waste handling systems, including wastewater sumps, tank and piping, to meet applicable RCRA requirements. FMC will complete these upgrades by September 30, 1999. The furnace building upgrades shall include the following:

- (vi). The emergency backup line from the new V-3800 tank to the V-3600 tank shall conform to the requirements of 40 C.F.R. Part 265, Subpart J.
- (vii). FMC shall eliminate the Medusa Scrubber liquor line to the V-3600 tank.

B. Phos Dock Upgrades

1. FMC shall upgrade the wastewater tanks and wastewater piping inside and outside of the phos dock area to meet the applicable requirements of 40 C.F.R. Part 265, Subpart J by September 30, 1999.

2. FMC shall complete the following upgrades by not later than September 30, 1999:

- a. FMC shall install a new clarifier feed surge tank to improve the ability of the phos dock to recycle water and recover P_4 . This tank shall be designed and constructed to provide surge capacity, prior to clarification, for increased recycle water flows from the furnace building and phos dock.
- b. FMC shall direct the recycle water from the rail car collection system to the clarifier feed surge tank.
- c. FMC shall install pumps in the phos dock tank containment areas to pump collected water to the clarifier feed surge tank.
- d. The dock northeast sump shall be used exclusively for recycle of process water. This sump shall become an extension of the intercept sump, pumping heavy material to the multicone feed tank and light material to the clarifier surge tank. Pad water will continue to enter this sump and be recycled to the clarifier surge tank.

3. FMC shall initiate upgrades immediately to the wastewater tanks and wastewater piping in the phos dock area to meet RCRA requirements. FMC shall complete these upgrades by September 30, 1999. The upgrades will consist of the following:

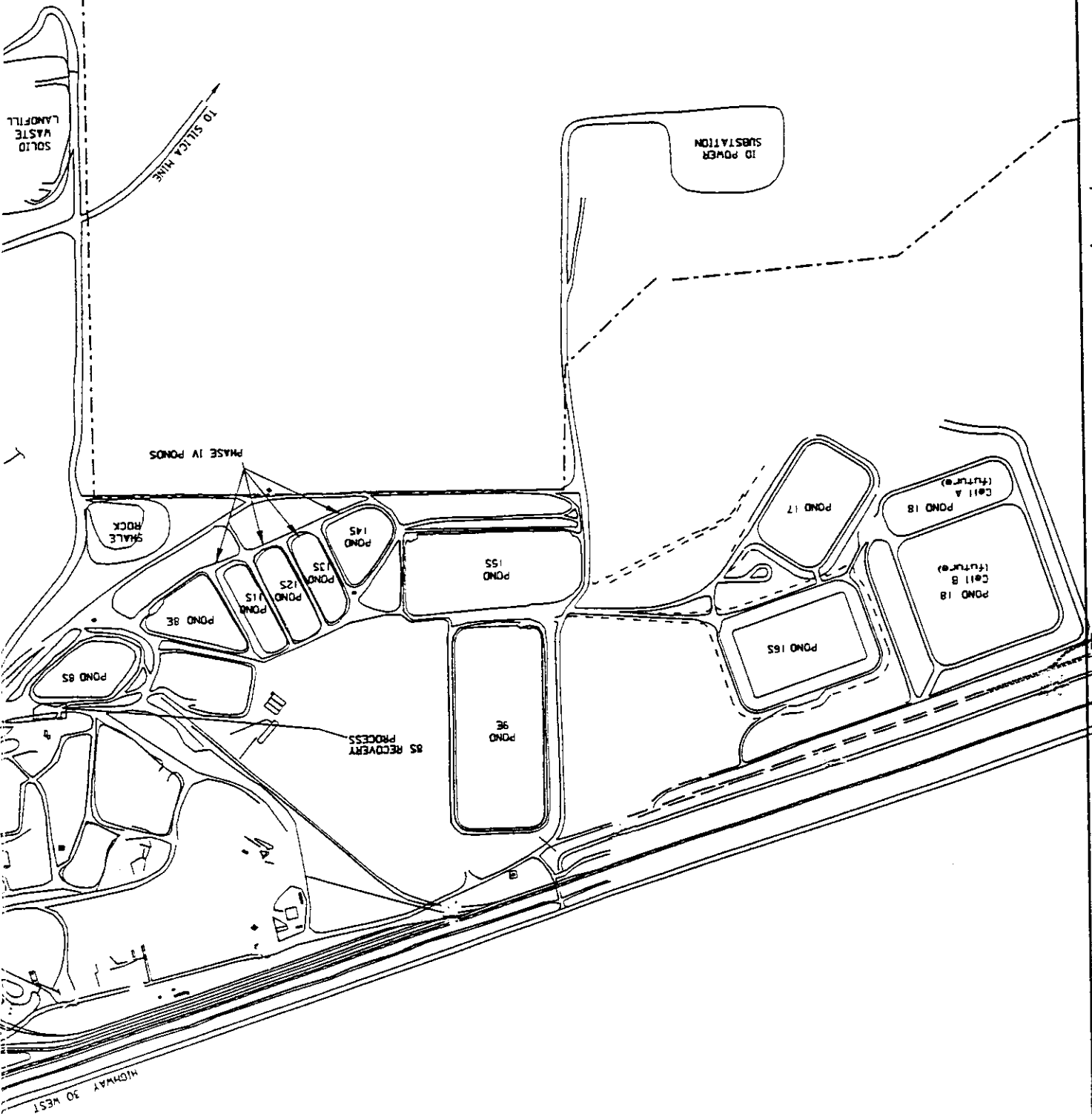
- a. New Wastewater Collection Tank. FMC shall cease using and close the existing north solids tank and install a new wastewater collection tank to be known as "the V-3800 tank." FMC shall route all phos dock waste streams to the V-3800 tank. Wastewater from V-3800 shall be pumped directly to the ponds or to the V-3600 tank. FMC shall design and construct the V-3800 tank and the piping from V-3800 to the ponds or to V-3600 to meet the requirements of 40 C.F.R. 265, Subpart J.

APPENDIX 3

Furnace Building Flow Diagram

Phos Dock Flow Diagram

Map of Ponds and Property at the FMC Pocatello Facility



ATTACHMENT B

SUPPLEMENTAL ENVIRONMENTAL PROJECTS

I. General Requirements

1. FMC shall implement Supplemental Environmental Projects ("SEPs") at its Pocatello Facility, as set forth in Section II, infra. FMC certifies that the estimated costs of these SEPs have been calculated according to standard protocols used by FMC to evaluate similar projects for corporate review and approval. FMC shall maintain complete documentation of the cost estimates and actual costs of design, construction, and operation, for each SEP until EPA approval of the Final SEP Report for that SEP in accordance with Paragraph 11, infra.

2. Each SEP described in Section II, infra, includes a schedule for development and implementation. Each SEP shall proceed independently, according to the planned schedule.

- a. For performance measures or schedule milestones in which a project design is required as demonstration of performance, FMC shall provide EPA by the due date a summary of each design.
- b. For performance measures which require opacity or visible emission readings and/or a source test of equipment or control technology, FMC shall perform such performance measures in accordance with the requirements of 40 C.F.R. §§ 60.8(a) and (d). FMC shall submit to EPA, within 90 days of completion of each test, the results of such tests.

3. It is expressly understood that adherence to SEP schedules will be critical to EPA's approval of the Final SEP Report for each SEP. FMC may request schedule extensions from EPA in writing, no less than thirty (30) days before the affected schedule deadline.

- a. EPA retains the sole discretion to determine whether such an extension will be permitted. Stipulated penalties due under Paragraph 13 will accrue during any period of extension unless excused by EPA in writing.
- b. In the event that FMC fails to meet a schedule requirement for a particular SEP, and remains in default of that requirement for a period of thirty days without obtaining written approval from EPA for the

1. Slag ladling:	\$2,276,300
2. Secondary Flare and Flare Pit Emission Reduction (Excess CO Burner):	\$1,758,650
3. Calciner scrubber emission reductions:	\$ 256,700
4. Phos-Dock Fugitive Emissions Controls:	\$ 51,850
5. Furnace flare controls:	\$ 70,550
6. Burden level fugitive dust control:	\$ 88,400
7. Furnace pressure relief upgrades:	\$ 119,000
8. Nodule handling fugitive dust:	\$ 463,250
9. Coke dust baghouse replacement:	\$ 147,900
10. Dust silo baghouse:	\$ 82,450
11. Dust control for the N.E. corner area sources:	\$ 198,050
12. Ore stockpile and shale handling improvements:	\$ 230,350
13. Nodule fines baghouse and dry material recycle:	\$ 384,200
14. Fort Hall Environmental Health Assessment:	\$ 307,350

7. EPA may reduce any penalty due under Paragraph 6(b) in its sole discretion, if it determines that FMC made good faith and timely efforts to complete the project, and provided that FMC certifies, with supporting documentation, that at least 50% percent of the amount of money which was required to be spent was expended on the SEP.

8. Within sixty (60) days of the completion of each SEP, including any requirement for continuous use or operation of the system, pursuant to Paragraph 14, FMC shall submit to EPA for approval a Final SEP Report containing the following information:

- a. A narrative description of the development and/or implementation of the SEP, including a discussion of the process involved and the technology utilized;
- b. A description of any operating problems encountered and the solutions thereto;
- c. Any identification of materials to be treated as confidential in conformance with 40 C.F.R. Part 2, together with the designation and enclosure of any material or information that may be publicly released;
- d. A discussion of actual emissions reductions, as compared to projected emissions reductions, as a result of the SEP. Emission reductions shall be referenced to the 1996 emission inventory or subsequent emission inventory, as appropriate, for the source. Where available, emissions after project completion shall be based on source tests.

11. If EPA identifies deficiencies in or rejects the Final SEP Report, or an O&M Plan, EPA shall permit FMC the opportunity to respond in writing to the notification of deficiency or disapproval given pursuant to Paragraph 10 within ten (10) days of receipt of such notification. EPA and FMC shall have an additional thirty (30) days from the receipt by EPA of the notification of objection to reach agreement. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision to FMC, which decision shall be final and binding upon FMC. FMC agrees to comply with any requirements imposed by EPA as a result of any such deficiency or failure to comply with the terms of this Attachment B. In the event the SEP is not thereafter completed, FMC shall pay EPA a cash penalty in the amount specified in Paragraph 6(b).

12. For all SEPs not completed as of January 1st of each year, FMC shall submit an Annual Progress Report to EPA, due each March 1st, summarizing for each uncompleted SEP:

- a. Any modification of the SEP approved under Paragraph 4, supra, or for which FMC expects to seek approval;
- b. Actions taken by FMC toward implementation of each SEP during the previous year;
- c. Activities in further implementation of each uncompleted SEP that are scheduled for the upcoming year;
- d. The anticipated schedule for completion of each uncompleted SEP, including a discussion of any actual or anticipated delays;
- e. Expenditures incurred to date for each SEP, together with projected expenditures for the upcoming year.

13. Failure to meet any SEP implementation or construction deadline, or to submit the Final SEP Report or any Annual Progress Report required by Paragraphs 8 and 12, supra, shall be deemed a violation of this Consent Decree, and FMC shall become liable for stipulated penalties pursuant to Paragraph 47(c) and (d) of the Consent Decree.

14. Except as set forth in Paragraph 15, supra, FMC shall continuously use or operate the systems installed as SEP for not less than five (5) year(s) subsequent to installation, or until the effective date of an emission limit or control requirement established by EPA in a Federal Implementation Plan, and which is applicable to the system installed as a SEP, whichever is earlier.

15. In the event that FMC permanently discontinues use of the process equipment that generates the emissions treated by a SEP, and provided that FMC has spent at least 50% of the estimated cost of the SEP as set forth in Section II, infra (including both capital costs and

Shoshone-Bannock Tribes
Air Quality Program
Land Use Department
P.O. Box 306
Fort Hall, Idaho, 83203

Documents concerning the Fort Hall Environmental Health Assessment shall be sent to the following address:

Director, CERCLA/RCRA Program
Shoshone-Bannock Tribes
P.O. Box 306
Fort Hall, Idaho 83203

II. Description of Supplemental Environmental Projects

FMC shall undertake the following Supplemental Environmental Projects, which the parties agree are intended to secure significant environmental or public health protection and improvements.

1. Slag Ladling:

Project description:

FMC shall design, purchase, and install equipment and modify the plant as necessary for the collection and transport of slag in the molten state via ladles or pots to final storage of slag in the slag pile. The slag will be tapped from the existing furnaces into runners which will flow into slag ladles or pots. The pots will be vented to the Medusa Andersen (Tm) ventilation system for each furnace. Slag tapping hoods will be upgraded to improve fume capture and control efficiency. Ventilation upgrades will be completed to improve capture and control of slag tap fumes. The slag ladles containing molten slag will transport slag to the slag pile for final disposal using slag haulers. This project consists of three phases.

1. Purchase, install, and operate slag ladling systems for four furnaces.
2. Purchase, install, and operate improved slag tapping systems for furnaces #2 and #3.
3. Purchase, install, and operate improved ventilation systems for furnace #2 and #3.

of proving the existence of a malfunction. FMC shall maintain properly signed contemporaneous records documenting the date, time and duration of the malfunction; the probable cause of the malfunction; and any corrective action or preventative measures taken.

- Per paragraph I.2.b above, FMC shall observe opacity for three days each week, for a period of 10 minutes each day and shall record and report opacity to EPA at the end of the three month time frame. Opacity shall be observed using 15 second observation periods for a total of four observations each minute using EPA Method 203C (58 FR 61640, November 22, 1993). FMC shall document whether visible emissions emanate from fuming of hot slag from pots or other points in the old slag pit area. Observations shall be made of slag tapping area as viewed from exterior of the furnace building and in the general area of the old slag pits.
- Per paragraph I.2.b above, FMC shall observe opacity of the dumping of molten slag to the slag pile for a period of 10 minutes for each of ten consecutive dumps, and shall record and report opacity to EPA at the end of the observation period. Opacity shall be observed using 15 second observation periods for a total of four observations each minute using EPA proposed Method 203C (58 FR 61640, November 22, 1993).
- After completion of the tapping modifications to furnace #2, FMC will conduct a one time performance test of PM-10 emissions from the scrubber for furnace #2 using EPA Methods 201 and 202. This test will be completed in accord with I.2.b above.

2. Secondary Flare and Flare Pit Emission Reduction (Excess CO burner)

Project description:

- a. Interim measures: Until the secondary condenser flare and ground flare pit are eliminated as specified in Paragraph 2.b. infra, FMC will take the following interim measures to reduce secondary condenser "mini-flush" particulate emissions and to ensure there is no bias toward conducting mini-flushes during night time hours.
 - i. FMC shall limit mini-flushes to no more than 50 minutes per day (based on a monthly average) beginning January 1, 1999. FMC's 1997 data indicate that mini-flush duration averaged 100 minutes per day so this interim measure will result in an average emission reduction of 50%. Failure to meet this interim measure limiting mini-flushes to no more than 50 minutes per day (based on a monthly

fuel in the calciners to an enclosed burner/combustion device where the gas will be burned under controlled combustion conditions to oxidize CO to CO₂ and elemental phosphorus to particulate form. The off gas from the enclosed burner/combustion device will be sent to a high efficiency scrubber where particulate pollutants will be removed before the gas is vented to the atmosphere. The scrubber water will be sent to a water treatment and recycle system.

Schedule:

- FMC shall submit the first routine mini-flush report (for the first two months, including the first partial month after entry) no later than 75 days after entry of the Consent Decree. Subsequent reports will be submitted within 10 working days at the end of each two calendar month period.
- FMC shall comply with the interim measures described in paragraph 2.a.i. and ii, supra, beginning January 1, 1999.
- FMC shall complete the project design, PSD applicability determination, and pilot testing by January 1, 2000. The report on the project design shall include the PSD applicability analysis and a description of the high energy scrubber and its control efficiency.
- FMC shall construct and have fully operational the enclosed burner or combustion device and the high efficiency scrubber, and shall remove the ground pit flares by January 1, 2001.

Total cost:

- FMC shall expend \$18,480,000 in initial costs by January 1, 2001. FMC shall expend \$525,000 for annual operating costs in calendar year 2001, and \$700,000 each calendar year thereafter for the duration of this agreement.

Performance measures:

- FMC shall conduct a one time source test to determine PM-10, NO_x (NO, and NO₂), and radionuclide emission rate and showing that the control device achieves 95% control efficiency of PM-10. PM-10 emissions shall be determined using Method 201 and 202. No_x emissions shall be determined using 40 C.F.R. 60, Appendix A, Method 7. Radionuclide emissions shall be determined using EPA Method 111. A gamma spectroscopy analysis shall be conducted before analyzing filter catch for Po-210.

4. Phos-Dock Fugitive Controls:

Project Description:

- FMC shall make fume collection improvements throughout the phosphorus loading dock area. The northeast sump top will be replaced and the scrubber ducting from the sump will be upgraded. The #6 storage tank level controls and fume collection will be improved.

Schedule:

- FMC shall complete the project design by February 1, 1999.
- FMC shall complete the project by November 1, 1999.

Total Cost:

- FMC shall expend \$750,000 in total costs by January 1, 2000.

Performance Measures:

- FMC shall complete the milestones on schedule.

5. Furnace Flare Controls:

Project Description:

- FMC shall install equipment to allow the furnace and its off gas system to be isolated from the carbon monoxide header and directed to the furnace scrubber system to minimize flaring the furnace to the atmosphere.

Schedule:

- FMC shall complete the project design by November 1, 1998.
- FMC shall complete the project by September 1, 1999.

Total Cost:

- FMC shall expend \$1,000,000 by September 1, 1999.

Performance Measures:

- FMC shall replace the existing PRV's with an improved design that will quickly re-establish seal after furnace over pressure upset. Duration of PRV release will be reduced, and loss of or lowering of pressure set point will also be reduced.

Schedule:

- FMC shall complete the project by November 1, 1998.

Total cost:

- FMC shall expend \$1,600,000 by November 1, 1998.

Performance measures:

- FMC shall complete the milestones on schedule.
- FMC shall continue to monitor and report to EPA of the frequency and duration of furnace PRV releases as in previous years.

8. Nodule Handling Fugitive Dust:

a. General Program:

Project description:

- FMC shall evaluate the existing fugitive dust control technology and identify upgrades including replacement of old and least efficient baghouses with new units having increased capacity and reliability. Control systems will be updated.

Schedule:

- FMC shall complete the project design by May 1, 2000, which shall include identification of upgrades to be made and any baghouse (other than the East and West Proportioning Baghouses, which are described in 8 b. below) to be replaced and the date by which replacement will occur. FMC shall complete the project by August 1, 2002.

Total cost:

- FMC shall expend a total of \$5,000,000 by August 1, 2002.

Performance measures:

9. Coke Dust Baghouse Replacement:

Project description:

- FMC shall replace the existing baghouse with new, more efficient and higher capacity baghouse, including new ductwork. The result will be to approximately double the ventilation volume.

Schedule:

- FMC shall complete project by January 1, 1998.

Total cost:

- FMC shall expend \$1,100,000 in initial costs by January 1, 1998. FMC shall expend \$57,000 for annual operating costs beginning January 1, 1998, and each year thereafter for the duration of this agreement.

Performance measure:

- FMC shall complete the milestones on schedule.
- FMC shall conduct a one time source test, using EPA Methods 201 and 202, to determine emission rates of the new baghouse. These tests will be conducted in accord with I.2.b above.
- Per paragraph I.2.b, FMC shall observe, record, and report opacity of baghouse outlet emissions for three months. Opacity shall be observed once each day for a period of 10 minutes, every six days using EPA Method 9.

10. Dust Silo Baghouse:

Project description:

- FMC shall redesign and replace the pneumatic transport system to improve reliability, thus eliminating emissions to the atmosphere through holes and other leaks in the system.

Schedule:

- FMC shall complete the project design by November 1, 2001.
- FMC shall complete the project by April 1, 2002.

the Consent Decree.

- FMC shall complete the milestones on schedule, including all milestones in the Dust Control Plan.
- FMC shall document implementation of the measures in the Dust Control Plan through record keeping of actions taken under the Dust Control Plan, including the date and location of slag application, dust suppressants, and sweeping. FMC shall keep such records on file for 5 years for inspection by EPA and the Tribes.

12. Ore Stockpile and Shale Handling Improvements:

Project Description:

- FMC shall apply dust suppressants to stockpiles and adjacent unpaved areas and roads more frequently.

Schedule:

- Project is an ongoing effort beginning upon signing of this agreement.

Total Cost:

- FMC shall expend \$450,000 in initial costs by March 1, 1999. FMC shall expend \$215,000 for annual operating costs beginning January 1, 1999, and each year thereafter for the duration of this agreement.

Performance Measures:

- By January 1, 1999, FMC shall prepare and submit to EPA a dust control plan that identifies specific application rate (concentrations) and application frequency of dust suppressants for stockpiles.
- FMC shall keep records of dust suppressant purchase, application rate, and application location. FMC shall keep such records on file for 5 years for inspection by EPA and the Tribes.
- FMC shall complete the milestones on schedule.

13. Nodule Fines Baghouse and Dry Material Recycle:

Project Description:

specific study design or evaluations based upon health and exposure concerns raised by the Tribes. The Study Design Panel will submit to EPA the study design and criteria for comments. The Panel will also have responsibility for reviewing study progress and recommending changes as necessary to achieve study objectives.

The Study Design Panel will have responsibility for planning and oversight of the health/assessment study, including:

- review Tribal concerns and questions;
- review past studies and risk assessments related to Fort Hall;
- Recommend study(ies) that can best address Tribal health assessment concerns;
- Identify, screen and evaluate potential contractors;
- Recommend study contractor(s);
- Approve study protocol; establish method for collecting and managing study information in harmony with Tribal culture, customs and practices; and establish criteria for sound decision making and interpreting data; and
- Periodic review of study implementation thru completion and recommend changes if needed to achieve objectives.

Project administration, including selection of the Study Design Panel, approval of Study Design Panel recommendations, and overall project oversight will be the responsibility of the Study Management Team. The Study Management Team will be composed of an equal number of members appointed by each of the Tribes and FMC. The Study Management Team's responsibilities include:

- Approval of Study Design Panel Recommendations;
- Approval and management of contractors;
- Project administration, including schedule and budget; and
- Management of communication and education program.

Schedule:

- The study shall be conducted on the following schedule and budget. Achievement of the schedule dates set forth below is dependent on when previous actions are completed. Nonetheless, the overall project will be conducted at a pace such that fieldwork can be conducted in 2000-2001, or beginning in late 1999 if aggressive targets can be met. Changes to the schedule and budget shall be approved by the Study Management Team. However, extensions of time to complete the Final Study Implementation Report or to complete implementation of the Communication/Education Plan as well as any budget reductions require prior EPA approval.

Total Cost:

- FMC shall expend a minimum of \$1,650,000 in accordance with the above schedule.

Performance Measures:

- FMC shall complete the milestones on schedule.
- The Assessment/Study Plan shall include, but not be limited to:
 - (1) a description of the specific goals and objectives of the study and the specific tasks to be undertaken to achieve those objectives and goals;
 - (2) a description of the various field work projects;
 - (3) a description of the type of analyses that will be conducted on the information and data collected during the field work portion of the study;
 - (4) identification of the individuals or contractors who will be conducting the various components of the study, their responsibilities, and the qualifications of the scientific experts; and
 - (5) the schedule for completing the study.
- The Communication/Education Plan shall be developed and initiated directly following selection of the Communication/Education Team. Upon completion of the study, it will be revised as appropriate and submitted to EPA for approval. The Plan will be designed to inform and educate the members of the Fort Hall Tribal community on the progress and results of the study and shall include, but not be limited to:
 - (1) a description of the specific goals and objectives of the communication/education effort and the specific tasks to be undertaken to achieve those objectives and goals;
 - (2) an identification of the individuals or contractors who will be conducting the various components of the communication/education effort, their responsibilities, and the qualifications of the scientific experts; and
 - (3) the schedule for completing the communication/education effort and reporting results to EPA.

Nothing in this Section II shall be construed to abrogate EPA's authority to require testing under Section 114 of the Clean Air Act.

ATTACHMENT C

FMC Pocatello Plant Environmental Management System

Objectives

FMC will develop an Environmental Management System (EMS) for its Pocatello Plant that is consistent with state-of-the-art principles of environmental management. The Pocatello Plant EMS will be a single, defined management system that integrates environmental, health and safety requirements into work planning and operational processes to effectively protect workers, the public and the environment, and to comply with regulatory requirements.

The key elements of the Pocatello Plant EMS will be derived from the following sources:

- FMC-specific principles and requirements;
- The International Organization for Standardization (ISO) specifications and guidance for Environmental Management Systems (ISO 14001 Standard); and
- There will be enhanced emphasis on compliance assurance, pollution prevention and community outreach.

The final Pocatello Plant EMS will provide Company management with ongoing assurance that:

- Knowable environmental and operational risks have been identified;
- Risks are being appropriately managed;
- Environmental laws, regulations, and permit requirements are being adhered to;
- Appropriate policies, programs, and procedures are in place;
- Organizational responsibilities are clearly defined, understood, and carried out;
- Appropriate environmental control, quality assurance, and verification systems are in place;
- Company operations do not present unreasonable actual or perceived risks to the environment.

The Pocatello Plant EMS will be consistent with the following ISO 14001 principles:

- 2) Includes process for developing, approving, and communicating standard operating practices for activities having potentially adverse environmental or regulatory compliance impacts.
- 3) Clearly identifies organizational responsibilities for maintaining regulatory compliance, including required reporting to regulatory agencies.
- 4) Includes ongoing means of communicating environmental issues and information to all organization personnel, on-site service providers, and contractors, and for receiving and addressing their concerns.
- 5) Establishes and describes processes to ensure sustained interaction with regulatory agencies, and within the organization (e.g., between the various divisions, contractors, and the environmental department) regarding environmental requirements and regulatory compliance.

Organization, Personnel, and Oversight of EMS

- Describes, organizationally, how the EMS is implemented and maintained.
- Includes organization charts that identify units, line management, and other individuals having environmental performance and regulatory compliance responsibilities.
- Identifies and defines duties, roles, responsibilities, and authorities of key environmental program personnel in implementing and sustaining the EMS.

Accountability and Responsibility

- Specifies accountability and responsibilities of Pocatello Plant management, on-site service providers, and contractors for environmental protection practices, compliance, required reporting to regulatory agencies, and corrective actions implemented in their area(s) of responsibility.
- Describes potential consequences for departure from specified operating procedures, including liability for civil/administrative penalties imposed as a result of noncompliance.

Environmental Requirements

- Describes process for identifying, interpreting, and effectively communicating environmental requirements to affected FMC personnel, on-site service providers, and contractors, and ensuring that Pocatello Plant activities conform to those requirements.

- Describes program to ensure that organization employees are aware of its environmental policies and procedures, environmental requirements, and their roles and responsibilities within the environmental management system.
- Describes program for ensuring that personnel responsible for meeting and maintaining compliance with environmental requirements are competent on the basis of appropriate education, training, and/or experience.

Planning for Environmental Matters

- Describes how environmental planning will be integrated into other plans developed by the organization, as appropriate (e.g., capital improvements, training, maintenance).
- Requires establishing written goals, objectives, and action plans by operating organizational units with environmental responsibilities, as appropriate, including those for contractor operations conducted at the facility, and how specified actions will be tracked and progress reported.

Maintenance of Records and Documentation

- Identifies the types of records developed in support of the EMS (including audits and reviews), who maintains them and where, and protocols for responding to inquiries and requests for release of information.
- Specifies the data management systems for any internal waste tracking, environmental data, and hazardous waste determinations.

Pollution Prevention Program

- Describes an internal program for preventing, reducing, recycling, reusing, and minimizing waste and emissions, including procedures to encourage material substitutions. Also includes mechanisms for identifying candidate materials to be addressed by program and tracking progress.

Continuing Program Evaluation and Improvement

- Describes program for periodic (at least annually) evaluation of the EMS, including incorporating the results of the assessment into program improvements, revisions to the manual, and communicating findings and action plans to affected employees, on-site service providers, and contractors.

United States District Court
for the
District of Idaho
July 13, 1999

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 4:98-cv-00406

I certify that a copy of the attached document was mailed to the following named persons:

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Date: 7/13/99

BY: Sammy Johnson
(Deputy Clerk)